

VIRGIL E. MERCER AND MICHAEL J. MERCER

v.

BUREAU OF LAND MANAGEMENT

THE NATURE CONSERVANCY (INTERVENOR)

IBLA 93-401

Decided May 8, 2003

Appeals from a decision of Administrative Law Judge Ramon M. Child setting aside and remanding a June 12, 1990, Notice of Proposed Decision of the Gila Resource Area Manager, Bureau of Land Management, denying the application filed by Virgil E. Mercer and Michael J. Mercer seeking the grazing preferences held by The Nature Conservancy for the Muleshoe and South Rim Allotments located in the Safford District in southeast Arizona.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

When an application for grazing preferences in two allotments outside a grazing district (the majority of whose acreage had been acquired from the State by exchange) is denied by BLM on the basis that BLM is in the process of developing its long-term land use plan through the resource management planning process and continued grazing on the allotments is an issue to be addressed therein, it is error for the administrative law judge considering the appeal to expand the scope of the proceeding to engage in an initial adjudication of the present grazing preference holders' qualifications.

Federal Land Policy and Management Act of 1976: Land-Use Planning--  
Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses:  
Appeals

Under 43 CFR 4.478(b), BLM enjoys broad discretion in managing and adjudicating grazing preference, and when grazing preference is adjudicated by BLM, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. That standard is properly applied when BLM denies an application for grazing preference in two allotments outside a grazing district (the majority of whose land had been acquired from the State by exchange) on the basis that BLM is in the process of developing its long-term land use plan through the resource management plan process and continued grazing on the allotments is one of the issues to be addressed therein. Under the circumstances, such a reason provides a rational basis for denial of the application.

APPEARANCES: Constance E. Brooks, Esq., Denver, Colorado, for Virgil E. Mercer and Michael J. Mercer; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Steven J. Burr, Esq., and Bruna E. Pedrini, Esq., Phoenix, Arizona, for The Nature Conservancy.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Nature Conservancy (TNC) and the Bureau of Land Management (BLM) filed separate appeals from an April 26, 1993, decision of Administrative Law Judge Ramon M. Child setting aside and remanding a June 12, 1990, Notice of Proposed Decision of the Area Manager, Gila Resource Area, Bureau of Land Management (BLM). <sup>1/</sup> The Area Manager had denied the February 28, 1990, application of Virgil E. and Michael J. Mercer (the Mercers) seeking the grazing preferences held by TNC for the Muleshoe (No. 4401) and South Rim (No. 4529) Allotments in

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<sup>1/</sup> No protest of the Area Manager's June 1990 Proposed Decision was filed within the 15-day protest period established by 43 CFR 4160.2 (1990). In the absence of a protest, the Proposed Decision became the Area Manager's Final Decision. 43 CFR 4160.3(a) (1990).

southeastern Arizona. <sup>2/</sup> Judge Child concluded that TNC "is not engaged in the livestock business, does not own or control base property, does not intend nor want the land in question for grazing use, and is not qualified to hold the grazing preferences on the Muleshoe and South Rim Allotments." (Decision at 22.) Based on that conclusion, he canceled TNC's grazing preferences on the allotments and remanded the case to BLM "for reconsideration of the Mercers' application for grazing preferences on the Muleshoe and the South Rim Allotments \* \* \*." Id. at 23.

For the reasons stated below, we find that Judge Child improperly expanded the scope of the hearing in this case to address TNC's qualifications to hold grazing preferences on the two allotments and ignored BLM's rationale for denying the Mercers' application, i.e., that the District was in the process of developing its long-term land use plan through the resource management plan (RMP) process, and one of the issues for consideration was the continued livestock grazing on the Muleshoe and South Rim Allotments. Therefore, we must vacate Judge Child's decision and remand the case to BLM for an adjudication of grazing preference in the allotments in accordance with present applicable regulations, legal decisions, policies, and planning documents. <sup>3/</sup>

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<sup>2/</sup> "Grazing preference" was defined in the regulations at the time of the Mercers' application as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 CFR 4100.0-5 (1990). That same regulation presently states: "Grazing preference or preference means a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee." An AUM is the amount of forage needed to sustain one cow, or its equivalent, for one month. 43 CFR 4100.0-5.

<sup>3/</sup> We note that throughout the proceedings in this case, various parties make reference to Federal grazing "leases" or "permits" held by TNC on the allotments. A "grazing lease" is a "document authorizing use of the public lands outside grazing districts under section 15 of the [Taylor Grazing] Act for the purposes of grazing livestock." 43 CFR 4100.0-5 (1990). A "grazing permit" provides the same authorization for use "within grazing districts under section 3 of the [Taylor Grazing] Act \* \* \*." Id. The matter is settled, however, by BLM's records showing that both allotments are outside Grazing District No. 4, Arizona, established by Secretarial Order dated Feb. 14, 1936, and by a map showing the boundaries of that grazing district, as well as the boundaries of the two allotments. Thus, the lands in question were subject to grazing lease, rather than grazing permit. E.g., a "Grazing Preference Statement" (Form 4130-3 (May 1984)) refers to TNC's preference on the Muleshoe Allotment as "Section 15 lease"; TNC's grazing application for the South Rim

(continued...)

### Factual Background

In July 1982, TNC purchased the Muleshoe Ranch, base property for grazing preference of 456 Federal AUM's in the Muleshoe Allotment, which included private, State, and public lands.<sup>4/</sup> In August 1982, BLM approved TNC's grazing application (Form 4130-1b (June 1980)) requesting the transfer of that grazing preference. (Ex. A-1 at 5.)<sup>5/</sup> At that time, BLM considered the allotment to be a custodial allotment because public lands were a minority share of the allotment. (Tr. 276.) The lead agency on that allotment was the State of Arizona, and it had authorized nonuse to TNC for its State lands. Id.<sup>6/</sup> TNC applied for and received nonuse from BLM for 456 AUM's.<sup>7/</sup>

In 1986, BLM and the State of Arizona completed a land exchange which substantially increased both the amount of public lands (3,069 acres to 26,559 acres) in the Muleshoe Allotment and the Federal grazing preference available therein (456 AUM's to 4,032 AUM's). Under the terms of a March 1985 Memorandum of Understanding (1985 MOU) for land exchanges between BLM and the Arizona State Land Department, "[u]nless the land is to be dedicated to a use that would preclude grazing, the range user will have the preference to obtain grazing authorization from the new landowner." (Ex. R-4 at 4.)

The "Record of Decision and Rangeland Program Summary of the Safford Portion of the Eastern Arizona Grazing Environmental Impact Statement," dated

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<sup>3/</sup> (...continued)

Allotment (Form 4130-3a (September 1987), dated Apr. 16, 1990, lists the "Preference Code" as "15" for a Section 15 lease.

<sup>4/</sup> Joint Stipulation of Facts, received Feb. 18, 1992 (Stipulation), at ¶ 6.

<sup>5/</sup> That application listed the preference as 459 AUM's, but elsewhere in the record the preference is referred to as 38 AU's or 456 AUM's. See Stipulation at ¶ 6.

<sup>6/</sup> BLM range conservationist, William Brandau, testified: "They [the State] had it in non-use; BLM lands were unfenced. And if we authorized grazing on those 3,000 acres, they're going to be on the State lands. So [there was] a non-use situation on the Muleshoe prior to the [1986] exchange, we wouldn't even go out there and verify it because by normal operation, if the State lands were in non-use, we would authorize non-use on the BLM lands in a custodial situation." (Tr. 276.)

<sup>7/</sup> When the Area Manager issued her June 1990 decision, the regulations did not limit the period of time for which BLM could authorize temporary nonuse. See Public Lands Council v. U.S. Department of Interior Secretary, 929 F. Supp. 1436, 1444 (D. Wyo. 1996).

September 1987, contained the following statement in the Rangeland Program Summary regarding the Muleshoe Allotment:

On allotment number 4401, a nongrazing Cooperative Management Agreement (CMA) with Arizona Nature Conservancy is being prepared whereby the grazing privileges on this allotment will be suspended for a period of 5 years from the date it is signed. With this rest period from livestock grazing, wildlife habitat and riparian areas should improve. Also, the Resource Management Plan (RMP) for the Safford District will have been completed and any decisions needed due to this plan can be implemented.

(Ex. A-3 at 12.)

In December 1988, the Arizona Nature Conservancy, BLM, and the United States Forest Service completed the CMA. Therein, BLM agreed to "[p]lace the preference of allotment 4401 [Muleshoe Allotment] in temporary suspension for a period of approximately five years, pending the resource allocation decisions from the Safford District Resource Management Plan." BLM failed to issue a decision announcing that suspension; however, it "implemented that through annual authorization of non-use." (Tr. 277.) Thus, according to the record in the case, following its acquisition of base property in 1982, TNC sought and received from BLM nonuse for all the Federal grazing preference in the Muleshoe Allotment.<sup>8/</sup>

Turning to the history of the South Rim Allotment, in 1985 the Defenders of Wildlife Trust for the George Whittell Wildlife Preserve at Aravaipa Canyon (the Trust) purchased certain ranch properties from the Salazar family, including "state grazing leases and Taylor grazing (BLM) permit/lease land \* \* \*." (Ex. C-1 at 1.) The property acquired by the Trust served as base property for Federal grazing

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<sup>8/</sup> Margaret L. Jensen, the Gila Area Manager testified that "[t]he original leases were transferred from the state. That transfer had to honor -- the existing uses had to be honored." (Tr. 1140.) That position is consistent with 43 CFR 4110.1-1 (1990), which provided that when BLM acquired lands by exchange and an agreement required the honoring of existing grazing permits and leases, "such permittees or lessees shall be considered qualified for grazing use on those acquired lands." Such an agreement existed in this case, the 1985 MOU.

preference in the Turkey Creek Allotment.<sup>9/</sup> BLM combined that part of the Turkey Creek Allotment with the Panorama Allotment to create the South Rim Allotment.

In the 1986 exchange, BLM acquired State lands within the South Rim Allotment, increasing the grazing preference therein from 468 AUM's to 5,796 AUM's. In 1988, TNC acquired the former Salazar properties from the Trust. The record shows that in February 1989 BLM billed TNC \$2,790.00 for 1,500 AUM's of active preference in the allotment with 4,296 AUM's listed in nonuse. The bill was paid the same month. In May 1989, the Gila Area Manager executed an Allotment Management Plan (AMP) signed by TNC and Tex Salazar governing grazing practices in the two units of the South Rim Allotment. That plan provided that the West South Rim would "continue to be deferred from grazing" and that Salazar's cattle would graze in a 3-herd system. (Ex. A-9 at 7.)

Thereafter, in February 1990, the Mercers filed a grazing application with BLM seeking grazing preference and authorization to graze cattle in the allotments for the 1990 grazing season.<sup>10/</sup> In her decision dated June 12, 1990, the Area Manager denied that application because the Safford District Office was in the process of developing its "long term land use plan through the Resource Management Planning process. The continued grazing of the Muleshoe and South Rim Allotments is one of the issues that will be addressed and decided in the RMP document. A Final Decision on that issue has not yet been determined."<sup>11/</sup> (June 12, 1990, Decision at 1.) The Area Manager also offered as an additional reason for denial that, in accordance with 43 CFR 4110.3-2(c) (1990) and 43 CFR 4130.1-1(b) (1990), she had "authorized nonuse of the available Animal Unit Months to the current allottee, Nature

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<sup>9/</sup> As part of the agreement of sale, the Trust agreed to allow Salazar to "graze up to 125 animal units (cattle) and 4 head of horses year long for up to 10 years at no cost" with the Trust retaining the right to direct where and in what rotation the cattle could be grazed. (Ex. C-1 at 8.)

<sup>10/</sup> The Mercers sought preference for grazing use of 336 cattle and 4,032 AUM's on the Muleshoe Allotment, and 358 cattle and 4,224 AUM's on the South Rim Allotment, during the 1990 grazing year (Mar. 17 to Mar. 16), and also provided evidence of owning or controlling suitable base property. (Ex. R-7.)

<sup>11/</sup> In August 1991, BLM adopted the Safford District RMP, which was protested by the Arizona Cattle Growers' Association and Jeffrey Menges. Those protests were subsequently resolved and the RMP was finalized in July 1994. BLM stated therein that it would "continue to issue grazing permits and licenses, implement, monitor and modify allotment management plans and increase or decrease grazing authorizations as determined through the allotment evaluation processes." (RMP at 17.)

Conservancy, for conservation and protection of the range." <sup>12/</sup> Id. When that decision became final, the Mercers appealed, asserting four basic grounds for appeal:

- (a) BLM unlawfully issued and renewed a livestock grazing permit to TNC for reasons other than livestock grazing.
- (b) BLM authorized nonuse on the Muleshoe and South Rim allotments in violation of regulations and policy and did so in an arbitrary and capricious fashion.
- (c) BLM gave TNC preferential treatment including rights, privileges and treatment denied to other public land ranchers in the Gila Resource Area.
- (d) BLM attempted to "cover-up" violations of applicable grazing laws and regulations by using the "excuse" of developing a resource management plan as a reason for denying [the] application.

(Stipulation at ¶ 17.) TNC sought and was granted intervenor status before Judge Child.

### Analysis

In his decision, Judge Child identified only two issues: "Is TNC qualified to hold the grazing preferences for the Muleshoe and South Rim Allotments?" and, if not, "should [BLM] be required to award existing grazing preferences to a qualified applicant?" Judge Child's decision to cancel TNC's grazing preference turned on his conclusion that TNC was not "engaged in the livestock business," as required by 43 CFR 4110.1 (1990). Both TNC and BLM challenged that conclusion in their appeals to this Board.

Before the Board reached these appeals for adjudication, the Public Lands Council initiated a judicial proceeding, which the Board believed could have a bearing on the outcome of the appeals because of the focus of Judge Child's decision. Accordingly, the Board deferred ruling on the appeals to await the outcome of that proceeding. The proceeding in question was Public Lands Council v.

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<sup>12/</sup> The former regulation, 43 CFR 4110.3-2(c) (1990), provided that when active use was reduced it should be held in suspension or in nonuse for conservation/protection purposes until the authorized officer determined that active use could resume. Under 43 CFR 4130.1-1(b) (1990), "[c]hanges in grazing use may be granted by the authorized officer."

U.S. Department of Interior Secretary, No. 95–CV–165–B (D. Wyo.). That case involved a challenge by various nonprofit organizations and livestock associations to the Department's rulemaking, published in the Federal Register on February 22, 1995, with an effective date of August 21, 1995 (60 FR 9895), which amended various regulations relating to the administration of livestock grazing on public lands. One of the regulations at issue therein was the amendment of 43 CFR 4110.1 (1990), which eliminated the requirement that, in order to qualify for grazing use on the public lands, an applicant must be "engaged in the livestock business." See 60 FR at 9962. This case played out through the District Court (929 F. Supp. 1436 (D. Wyo. 1996)), the United States Court of Appeals for the 10th Circuit (Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999)), with the ultimate decision being issued by the Supreme Court on May 15, 2000, Public Lands Council v. Babbitt, 529 U.S. 728, 120 S.Ct. 1815 (2000).

Because of our conclusion that Judge Child erred in expanding the scope of his review to include whether or not TNC was qualified to hold grazing preferences for the Muleshoe and South Rim Allotments, the proceedings referenced above do not have a bearing on the resolution of the present appeal. <sup>13/</sup>

[1] BLM argued below before Judge Child that TNC's qualifications were not an issue in this case in a pre-hearing motion to dismiss, in an oral motion to dismiss presented at the hearing, and in its post-hearing brief to Judge Child. It asserted that the issue for resolution was whether or not BLM had erred in denying the Mercers' application on the basis that BLM's long-term land use planning process was incomplete and that one of the questions being addressed in the planning process was whether to continue to graze the two allotments. Any consideration of TNC's qualifications to hold grazing preferences for those allotments, BLM argued, would result in an initial adjudicatory decision. Initial adjudicatory decision making in such matters, it contended, was solely the province of BLM.

Judge Child addressed BLM's argument, as follows, in his decision:

By electing intervenor status in this proceeding, TNC placed itself and the question of its qualifications to hold grazing preferences on the Muleshoe and South Rim Allotments within the jurisdiction of the Administrative Law Judge presiding. Contrary to BLM's contentions, a determination of TNC's qualifications in this proceeding does not constitute an "initial adjudicatory decision" or an advisory opinion. One

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<sup>13/</sup> The proceedings in the Public Lands Council litigation, as well as the Solicitor's Oct. 4, 2002, memorandum, entitled "Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands," may be relevant to BLM's future adjudication of grazing preference for the allotments.

of the grounds for denying the Mercers' application is that nonuse was granted to the present preference holder, TNC. To grant nonuse to TNC, BLM necessarily must have determined that TNC was qualified to hold the preference and that evidence shows that such a determination was made. (Tr. 964, 1058)

The qualifications of TNC are subject to evaluation in this proceeding for the additional reason that the Mercers applied for "permanent," rather than temporary, permits to graze the allotments. [<sup>14/</sup>]

(Decision at 8.)

Judge Child was incorrect in his reasoning. The fact that TNC intervened in a proceeding in which the Mercers were raising issues concerning its qualifications to hold grazing preferences hardly makes its qualifications an issue if those qualifications were not the subject of the decision being appealed, and they clearly were not. Judge Child's citations to the transcript at Tr. 964 and 1058, as evidence that BLM "must have determined that TNC was qualified to hold the preference," do not support a conclusion that TNC's preference was the subject of adjudication in the decision at issue. At Tr. 964, the Gila Area Manager, was asked whether TNC was "qualified to hold a livestock permit." She responded: "Under the grazing regulations that we are working with now, yes, they are qualified." At Tr. 1058, she confirms that she made the statement at Tr. 964. Those statements, however, were Jensen's opinion, as expressed at the hearing, not an adjudication in the form of a written decision subject to appeal.

It cannot be denied that BLM authorized nonuse to TNC. However, it did not do so in the decision that was appealed to Judge Child. That decision simply included the factual statement that the Area Manager had authorized nonuse to TNC. The record shows that TNC's grazing application for nonuse on the Muleshoe Allotment for the 1990 grazing season was signed and dated by TNC on February 14, 1990. Area Manager Jensen approved that nonuse on February 22, 1990. Also, TNC's grazing application for nonuse of the South Rim Allotment for the 1990 grazing season was signed and dated by TNC on April 16, 1990. Area Manager Jensen approved that nonuse on May 1, 1990.

Thus, the June 12, 1990, BLM decision appealed by the Mercers cannot reasonably be considered an adjudication of TNC's preference or the actual determination to authorize nonuse. The Area Manager had authorized nonuse for the 1990 grazing season prior to issuance of her decision denying the Mercers'

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<sup>14/</sup> We take Judge Child's reference to "permanent" permits to be mean "grazing preference."

application, and, in fact, for the Muleshoe Allotment prior to receipt of the Mercers' application. Thus, the only issue before Judge Child was whether the Area Manager had properly denied the application for reasons stated therein, which were that BLM was engaged in the land use planning process and was considering whether to allow continued livestock grazing in the allotments and that the current allottee, TNC, had been granted nonuse. Despite that fact, Judge Child made TNC's qualifications the principal issue in the proceeding before him.

The rationale for BLM's nonuse authorization for the two allotments can be easily understood in light of the factual history commencing with TNC's acquisition of base property supporting grazing preferences in those allotments, which is set forth above. There is no doubt from the record in this case that TNC owned base property supporting the grazing preference in the Muleshoe and South Rim Allotments at the time the Mercers filed their application. In addition, on an annual basis, TNC had sought and received, since 1982 for the Muleshoe Allotment and 1989 for the South Rim Allotment, authorization from BLM to maintain all or part of that preference in a nonuse category. As a preference holder, TNC was entitled to a grazing lease. "The grazing permit or lease is a statement of permittee's or lessee's recognized grazing preference on the public land and/or other lands administered by BLM." (Ex. A-16 at 7.) <sup>15/</sup>

Whether or not TNC satisfied the mandatory qualifications of 43 CFR 4110.1 (1990) for grazing use in the Muleshoe and South Rim Allotments was not a question adjudicated by BLM in the decision appealed to Judge Child. BLM merely denied Mercers' grazing application for the reasons stated in its decision, and BLM's rationale for not undertaking a preference adjudication is compelling given the practical circumstances. At the time TNC acquired base property in the Muleshoe Allotment in 1982, the State of Arizona controlled a majority of the land in the allotment and was authorizing nonuse to TNC for its State lands. BLM followed suit because the BLM lands were unfenced. In 1986, BLM completed an exchange with the State and thereby substantially increased the amount of public land in both the Muleshoe and South Rim Allotments. That newly acquired land had not been the subject of BLM land use planning and was not within a grazing district. However, thereafter BLM did complete an interim management agreement (the 1988 CMA for the Muleshoe) or plan (the 1989 AMP for the South Rim) covering each allotment. In so doing, BLM adopted the status quo regarding grazing on those allotments pending completion of its land use planning process.

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<sup>15/</sup> Exhibit A-16 is the BLM Grazing Administration Handbook, H-4130-1 - Authorized Grazing Use (1984). The quoted language is from H-4130-1.2 on page 7.

With that background, when the Mercers filed an application for grazing preference in the allotments in 1990, the Area Manager reasonably denied the application on the basis that BLM was engaged in its land use planning process and that “[t]he continued grazing of the Muleshoe and South Rim Allotments is one of the issues that will be addressed and decided in the RMP document. A Final Decision on that issue has not yet been determined.” <sup>16/</sup> (June 12, 1990, Decision at 1.)

While the Area Manager did offer as an additional ground for denial the fact that TNC had been authorized nonuse in the allotments for the 1990 grazing season, that reason did not put into issue TNC’s qualifications to hold grazing preference.

As the Area Manager, testified:

[M]y reasoning for denying the [Mercers'] application was based on where we were at in the land use planning process[.] \* \* \* I was very concerned about how we were going to manage these lands for the long term and what kind of management prescription we were going to apply to these lands in the resource management plan. I didn't want to prejudge that decision by approving additional use in those areas until I was clear in my own mind how I wanted to proceed with resource management on these two allotments. \* \* \* [I]n my mind I could not separate this application from the planning process. To me, my action on this application had to be consistent with how I was proceeding in my land use planning process.

(Tr. 978–80.)

Thus, it is clear that the Area Manager intended to maintain the status quo until BLM completed its land use planning. The Mercers should not have been allowed to force an adjudication of TNC's qualifications, at a time when the issue of grazing in the allotments was unsettled. Judge Child's refusal to heed BLM's warning that proceeding to review TNC's qualifications would amount to an unauthorized initial adjudicatory decision caused the parties the unnecessary time and expense of

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<sup>16/</sup> The Supreme Court recognized the importance of land use planning to the authorization of grazing use on the public lands in Public Lands Council v. Babbitt, wherein the Court stated that "the Secretary has since 1976 [when section 202 of the Federal Land Policy and Management Act of 1976 was enacted into law] had the authority to use land use plans to determine the amount of permissible grazing." 120 S.Ct. at 1824; see 43 U.S.C. § 1732(a) (1994). See also David R. Hinkson, 131 IBLA 251, 254 (1994), stating that the land classification provisions of the Taylor Grazing Act had been superseded by the land use planning provisions of FLPMA.

an extensive hearing, not to mention the delay of more than a decade in resolution of this matter.

While Judge Child makes much of the point that the Mercers were seeking "permanent permits", not merely "temporary" grazing authorization for the allotment, that fact has no bearing on whether or not TNC's qualification should have been an issue in the present case. Whether the Mercers were seeking grazing preference or "temporary" authorization to graze, BLM's rationale for denial was appropriate.

Rather than correct Judge Child's error, the dissent would perpetuate it, at least in part on the theory that by denying the Mercers' application, while routinely processing other applications, BLM was acting arbitrarily, which the dissent describes as an "inconsistency." The factual history of TNC's acquisition of base property supporting grazing preferences in the allotments in question shows, however, that BLM's annual authorization of nonuse for TNC's preference and its denial of the Mercers' application cannot be equated. There is no inconsistency.

BLM's actions simply maintained the status quo; the Mercers' application sought to change it. The Mercers did not hold preference in either of the allotments; TNC did. By taking action on TNC's annual grazing applications, BLM was honoring the pre-exchange conditions as part of its interim management activities pending final land use planning. By their application, the Mercers sought to effect an adjudication of the preference. BLM declined to do so by denying the Mercers' application.<sup>17/</sup> Its rationale for doing so finds support in the regulations, which require that resource management authorizations and actions conform to the approved RMP. 43 CFR 1610.5-3(a); see Jenott Mining Corp., 134 IBLA 191, 193-95 (1995). The dissent confuses maintenance of the status quo with preferential treatment.

Regardless of what TNC's qualifications may have been to hold the preference at issue at the time the Mercers filed their application, under the circumstances herein, particularly the acquisition of substantial acreage in both allotments from the state by exchange, in the absence of a final RMP, the Area Manager in this case adopted a wise course of action - - denial of the Mercers' application until finalization of the RMP. There was no reason to adjudicate preference in the allotments when the issue of continued grazing in the allotments had not been finalized. In addition, the Area Manager did not preclude the Mercers from refile at a later date. One need look no further than the history of this proceeding to see the type of time-

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<sup>17/</sup>There is evidence in the record that other parties sought preference in the allotments and that BLM denied those applications at the same time it denied the Mercers' application, providing the same rationale as that given the Mercers. See Tr. 1032-1039; Exs. A-11 and A-12.

consuming adversarial grazing preference adjudication BLM sought to avoid before finally determining whether to continue grazing on the allotments.

[2] We have stated on numerous occasions that under 43 CFR 4.478(b), BLM enjoys broad discretion in managing and adjudicating grazing preference, and that when grazing preference is adjudicated by BLM, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. The burden is on the objecting party to show that a decision is improper. MacKenzie v. BLM, 140 IBLA 192, 197 (1997); Klump v. BLM, 124 IBLA 176, 182 (1992); Fasselin v. BLM, 102 IBLA 9, 14 (1988). Application of that standard, however, has not been limited to cases involving actual preference adjudication. In Iriart v. BLM, 126 IBLA 111, 114 (1993), a case involving the denial of an application for change of livestock use, this Board stated: "While the BLM decision in this case was not an actual adjudication of grazing preference because appellant's current authorized use of the allotment was not affected, it is a decision arising under the grazing regulations in 43 CFR Part 4100, and we find the same standard to be applicable." The Area Manager's decision in this case was not an actual adjudication of preference. Nevertheless, we believe the above-stated standard is applicable.

The Area Manager's decision was not arbitrary; it was not capricious; and it was not inequitable. It clearly was supported by a rational basis. Accordingly, her decision should have been affirmed by Judge Child. His decision to do otherwise must be vacated and the case is properly remanded to BLM to adjudicate the preference for the two allotments in question in accordance with applicable regulations, legal decisions, policy, and relevant planning documents.<sup>18/</sup>

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<sup>18/</sup> Because of our disposition of this case, we take no position on whether or not under applicable authority TNC was qualified to hold grazing preference in the allotments in 1990, which was the subject of Judge Child's decision. That issue is clearly moot.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to BLM for action consistent with this opinion. <sup>19/</sup>

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Bruce R. Harris  
Deputy Chief Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Lisa Hemmer  
Administrative Judge

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David L. Hughes  
Administrative Judge

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T. Britt Price  
Administrative Judge

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<sup>19/</sup> Administrative Judge Irwin took no part in the en banc discussions or en banc opinions in this case.

## ADMINISTRATIVE JUDGE ROBERTS DISSENTING:

A majority of this Board's members vacate the April 26, 1993, decision of Administrative Law Judge Ramon M. Child (Judge Child), in which he set aside a June 12, 1990, Notice of Proposed Decision of the Area Manager, Gila Resource Area, Arizona, Bureau of Land Management (BLM). Judge Child canceled grazing preferences <sup>1/</sup> related to the Muleshoe (No. 4401) and South Rim (No. 4529)

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<sup>1/</sup> In footnote 3, the majority refers to the distinction between grazing "permits" and "leases," noting that "[a] 'grazing lease' is a 'document authorizing use of the public lands outside grazing districts under section 15 of the Taylor Grazing Act of 1934 (TGA), as amended, 43 U.S.C. §§ 315, 315a to 315r (2000), for the purposes of grazing livestock," and that "[a] 'grazing permit' provides the same authorization for use 'within grazing districts under section 3 of the [TGA] \* \* \*.'"

The parties to this proceeding use the terms "permit" and "lease" very interchangeably. Examples are numerous throughout the record. In TNC's "Proposed Findings of Fact and Conclusions of Law," with regard to the Muleshoe Allotment, it states that "TNC acquired the deeded land, Forest Service permit, state grazing lease and BLM grazing permit for the Muleshoe Ranch from Dr. Richard Wilson in 1982 (Stipulation para. 6), and that "[a]fter TNC acquired Muleshoe, both BLM and the state authorized non-use in TNC's grazing permit and lease. (Tr. 276; Stipulation para. 8)." (Emphasis added.) Further, in the "Reply of Intervenor The Nature Conservancy to Appellants' Post Hearing Brief," at 5, TNC stated that it was "in compliance with its permits and the grazing regulations." (Emphasis added.) Again, in the Mercers' "Reply Brief," at 1, they refer to TNC's argument that it is "engaged in the livestock business to the degree necessary to qualify for grazing permits," and at 4, they assert, in accordance with the record, that "the question whether TNC was qualified to hold the grazing permits was also debated among BLM personnel, Vol. VII, p. 1058, ll. 16-24." In fact, Judge Child began his hearing with the observation that it was "being held by the authority of Section 9 of the Taylor Grazing Act, found in 43 United States Code, Section 315-H." The record shows that the status of the subject lands in terms of whether they were covered by section 3 or section 15 of the TGA was not a subject of debate among the parties involved in this matter.

In any event, the majority's observation is irrelevant for our present purposes. Regardless of whether TNC held "leases" or "permits" covering the subject Allotments, it was required to meet the qualifications standards of the TGA and implementing regulations, as discussed elsewhere in this opinion. Judge Child properly considered and ruled on the issue. See Ralph E. Holan, 18 IBLA 432 (1973), discussed in Judge Child's decision at pages 12-13, in which the Board stated that the qualifications standard under the regulations was essentially the same, whether section 3 or section 15 grazing preferences were involved. 18 IBLA at 434.

(continued.....)

Allotments (hereinafter "Allotments"), which had been awarded to the Nature Conservancy (TNC) for nonuse on an annual basis for over a decade, remanded the matter to BLM for reconsideration of the application for grazing preferences filed by Virgil E. and Michael J. Mercer (the "Mercers"), and set aside BLM's decision denying a February 28, 1990, application by the Mercers for grazing preferences held by TNC for the Allotments in southeastern Arizona. The majority concludes that the Area Manager's decision "was supported by a rational basis." (Majority Opinion at 29.) Further, the majority ultimately concludes that Judge Child should have affirmed the Area Manager's decision, and that any "decision to do otherwise must be vacated and the case is properly remanded to BLM to adjudicate the preference for the two allotments in question in accordance with applicable regulations, legal decisions, policy, and relevant planning documents." *Id.*

We agree with the majority as to the ultimate disposition of this case as a procedural matter, *i.e.*, that this matter should be remanded to BLM for an adjudication of the preferences for the two Allotments. We observe that this adjudication should have been conducted in 1990. However, we find it impossible to agree with the majority's ruling that Judge Child's decision on the merits should be vacated. Rather, we would affirm that portion of his decision.

We respectfully dissent from the majority's holding that Judge Child erred in considering whether TNC was qualified to hold the grazing preferences related to the subject Allotments. The majority improperly places the issue of TNC's qualifications beyond the purview of Judge Child and this Board, noting that the "BLM decision appealed by the Mercers cannot reasonably be considered an adjudication of TNC's preference or the actual determination to authorize nonuse." *Id.* at 25. There is simply no logic to the majority's analysis. The majority says that the "BLM decision appealed by the Mercers cannot reasonably be considered \* \* \* the actual determination to authorize nonuse," when the Area Manager's decision says, "I have authorized nonuse." We cannot subscribe to this reasoning.

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1/ (...continued)

The majority states that "[t]he matter is settled, however, by BLM's records showing that both allotments are outside Grazing District No. 4, Arizona, \* \* \* and by a map showing the boundaries of that grazing district, as well as the boundaries of the two allotments." The map to which the majority refers was generated by BLM at the recent request of the Deputy Chief Administrative Judge, through the Board's docket attorney. The map was not accompanied by any explanation as to what records BLM referred to or relied upon in its preparation. Were this matter of relevance to the Board's disposition of this case, we would ask the parties to address it.

As we demonstrate infra, the majority's position that Judge Child improperly expanded the scope of the hearing to consider TNC's qualifications, and that he issued an "initial adjudicatory decision," is inconsistent with the Taylor Grazing Act of 1934 (TGA), as amended, 43 U.S.C. §§ 315, 315a to 315r (2000), and implementing regulations, as construed by the Federal Courts, including the U.S. Supreme Court, and this Board's decisions. The majority fails to provide any meaningful authority for its position that Judge Child improperly considered whether TNC was qualified to hold grazing preferences for the subject Allotments. It appears that the majority would prefer to avoid a consideration of this case on the merits in favor of a limited procedural disposition which will result in BLM's undertaking a process that it should have handled well over a decade ago.

In her June 12, 1990, decision, the Area Manager, BLM, offered as her reason for rejecting the Mercers' application for grazing preferences that BLM was engaged in the process of developing a land use plan, pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (2000), for the area embracing the Allotments, and had yet to decide whether to permit continued livestock grazing in the allotments. She stated: "The Safford District is in the process of developing its long term land use plan through the Resource Management Planning process. The continued grazing of the Muleshoe and South Rim Allotments is one of the issues that will be addressed and decided in the RMP document. A Final Decision on that issue has not yet been determined."

The majority states that the Area Manager's decision "clearly was supported by a rational basis." (Majority Opinion at 29.) A review of the record shows that it is replete with evidence that the Area Manager was subjected to intimidation tactics on TNC's part that we conclude must have affected the issuance of 1-year nonuse authorizations which took place for over a decade. As an example, we will refer to a memorandum dated June 22, 1990, from Mark Heitlinger to Dan Campbell, Andy Laurenzi, Mark Apel, and Tom Collazo (Ex. 19 (Heitlinger Memo)) about "phone calls" to the Area Manager regarding BLM's preparation of an RMP and a related "grazing idea" concerning the South Rim Allotment, which would be grazed as follows: "The area east of Turkey Creek would be grazed by Eddie Lackner; \* \* \* The area west of Virgus would be grazed by Virgil Mercer's son who would be an active and progressive operator. The sand wash area, north of the Creek, would be integrated in with other allotments on the north slope, probably Salazars." (Heitlinger Memo.) Heitlinger stated that "[d]espite being flabbergasted by this, I retained my composure," indicated that he "saw some problems with it," and observed that the proposal "is a big dose of medicine for us to swallow." He said to the Area Manager that she "needed to balance the idealism of multiple use including grazing with building the relationship between BLM and TNC," and that "[p]ushing TNC to do more grazing would strain that relationship." Id. According to Heitlinger, the Area Manager "then got rather emotional, and with a shaky voice said she should

just realize that grazing \* \* \* is not negotiable for TNC." *Id.* The Area Manager, "[g]etting increasingly emotional," informed Heitlinger that "she would just have to make a decision" with regard to grazing the South Rim Allotment, and that TNC "might not like it." *Id.* Heitlinger drafted a letter in which he "tried to be non-threatening." *Id.*

In his memorandum, Heitlinger states to his colleagues: "It pains me to say it, but some consideration should be given to heavy handed and high stakes plays. I urge that no actions be taken unilaterally. If we do embark on end-runs, such as calling in chips at the state office or other threatening actions, let's take the time to review them as a group and talk out alternative strategies." *Id.* (Emphasis supplied by Heitlinger.) He proposes a number of "tactics" in dealing with BLM, including how other "high stakes" projects between TNC and BLM "will be jeopardized by minor squabbles over grazing." *Id.* (Emphasis supplied by dissent.) He states that the suggested tactics "could have nasty consequences," and that he wants to "be involved before a decision is made to pursue any of these or any other heavy handed tactics." *Id.* He concludes with the admonition, "please destroy this memo." *Id.* This is the memorandum which he admitted to Judge Child that he regretted writing only because it had to be produced at the hearing. (Tr. 1320-21.) We refer to this memo to the length that we do only to address the majority's "rational basis" contention. In another context, the Area Manager's decision could be viewed as having been informed by a "rational basis." However, when viewed in the context of this record, as discussed *infra*, we conclude otherwise.

We agree with Judge Child's ruling that at the time of the hearing, TNC was not in the livestock business for profit, and find that he was correct in canceling TNC's permits and preferences associated with the Allotments. The management plan covering the Allotments, which was an entire decade in preparation, has now been completed, resulting in BLM's final conclusion that grazing continues to be appropriate on the Allotments. We agree with the majority to the extent that it would remand this case to BLM for a determination as to which party is presently prepared to graze the Allotments, or at least during the application process explain how they qualify for the grazing preferences if they cannot presently graze, within the parameters of the TGA, FLPMA, and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. § 1901 (1994).

### Background

In his decision, Judge Child set forth the complicated factual background leading to his hearing and this resultant appeal. We do not disagree with the majority's summarization of the history of this case, except we wish to add the following portion of Judge Child's decision regarding the history of the Allotments at issue:

TNC has never owned any livestock associated with either the Mule-shoe Allotment or South Rim Allotment and no cattle have been legally placed on the two allotments, including TNC's base properties, during TNC's stewardship, other than cattle owned by Tex Salazar. (Tr. 37-38, 46-47, 283-287, 1061) TNC has no plans to purchase livestock to graze either allotment. (Tr. 40-41) The Area Manager testified that TNC does not want any livestock on the two allotments. (Tr. 945)

BLM personnel questioned whether TNC was in the livestock business and was qualified to hold the Muleshoe and South Rim grazing permits. (Tr. 1059) The Area Manager personally did not believe TNC was qualified, but she felt the regulations concerning grazing qualifications were unclear. (Tr. 1060-61) The Area Manager believed it was within her discretion to determine whether a permittee is qualified to hold a grazing permit. (Tr. 1119-20) Ultimately, the Area Manager decided TNC was qualified to hold the grazing permits on the Muleshoe and South Rim Allotments. (Tr. 1058)

(ALJ Decision at 3-6.)

As noted, Judge Child ruled that TNC was not engaged in the livestock business, and was not qualified to hold the permits and associated preferences for the Allotments, as required under the regulations. BLM and TNC appealed his ruling to this Board, which suspended consideration of the matter pending resolution of litigation challenging the Department's 1995 rulemaking which amended various regulations concerning management of livestock grazing on public lands. See 60 FR 9895. Critical to this case was the amendment of 43 CFR 4110.1 (1992), which eliminated the requirement that an applicant must be "engaged in the livestock business" in order to be qualified for grazing use on public lands. See 60 FR at 9962. The relevance and applicability of the Federal litigation concerning the amendment of 43 CFR 4110.1 and other grazing regulations is discussed infra. See Public Lands Council v. U.S. Dep't of the Interior Secretary, 929 F.Supp. 1436 (1996); Public Lands Council v. Babbitt, 167 F.3d 1287 (10<sup>th</sup> Cir. 1999); and Public Lands Council v. Babbitt, 120 S.Ct. 1815 (2000).

### Analysis

The law is well settled that implementation of the TGA is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. Kay Kayser-Meyerling v. BLM, 152 IBLA 39, 43 (2000); Yardley v. BLM, 123 IBLA 80, 89 (1992). By regulation, the Department has provided that an adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR

Part 4100. 43 CFR 4.478(b). In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an ALJ and by this Board. Kay Kayser-Meyering v. BLM, *supra*; Eason v. BLM, 127 IBLA 259, 260 (1993). For the reasons set forth below, we hold that Judge Child's ruling that TNC was not in the livestock business, and was not qualified to hold the disputed grazing authorization, was reasonable and in substantial compliance with the Departmental grazing regulations just cited.

#### Judge Child's Consideration of TNC's Qualifications

Judge Child addressed whether TNC is qualified to hold the grazing preferences for the Allotments, and if not, whether BLM should be required to award existing grazing preferences to a qualified applicant, in this case the Mercers. Judge Child ruled that TNC "is not engaged in the livestock business, does not own or control base property, does not intend nor want the land in question for grazing use, and is not qualified to hold the grazing preferences on the Muleshoe and South Rim Allotments." (ALJ Decision at 22). He then canceled TNC's grazing preferences on the Allotments and remanded the case to BLM "for reconsideration" of the Mercers' application for grazing preferences on the Allotments. *Id.* at 23. We agree with Judge Child's rulings.

TNC, BLM, and the majority view as erroneous Judge Child's decision to address whether TNC was qualified to hold the permits and related preferences for the Allotments. The majority concludes that "Judge Child improperly expanded the scope of the hearing in this case to address TNC's qualifications to hold grazing preferences on the two allotments and ignored BLM's rationale for denying the Mercers' application." (Majority Opinion at 19.) The fact is that TNC and BLM devote their pleadings before this Board primarily to whether TNC is engaged in the livestock business and thus is qualified to hold the grazing permits and/or leases and preferences under 43 CFR 4110.1. As Judge Child noted in his decision, "BLM personnel questioned whether TNC was in the livestock business and was qualified to hold the Muleshoe and South Rim grazing permits," and the Area Manager who ultimately issued the grazing permits to TNC "personally did not believe TNC was qualified" to receive them. (ALJ Decision at 6.) The majority emphasizes that BLM argued that TNC's qualifications were not an issue in a pre-hearing motion to dismiss, in an oral motion to dismiss presented at the hearing, and in its post-hearing brief. These protestations alone disprove BLM's position, and demonstrate that the issue of TNC's qualification was indeed central to BLM's annual issuance of a nonuse grazing lease to TNC, to the hearing, and to the appeal presently before the Board. A review of the record shows that BLM's argument is devoid of merit, and that Judge Child would have been remiss had he ignored the question.

Early in his decision, Judge Child addressed TNC's argument that under 43 CFR 4.470(a) the Mercers waived the right to contest TNC's qualifications to hold preferences for the Allotments because they failed to raise the issue in their notice of appeal. See ALJ Decision at 7 and Post-Hearing Brief of TNC at 12. The regulation governing this waiver argument provides in relevant part: "All grounds of error not stated [in the appeal] shall be considered as waived, and no such waived ground of error may be presented at the hearing unless ordered or permitted by the administrative law judge." 43 CFR 4.470 (emphasis added.) The plain language of the regulation provides that even if the issue of TNC's qualifications had not been raised in the Mercers' appeal, Judge Child had the explicit authority to order or permit the so-called waived ground of error to be presented at the hearing.

Even in the absence of the above-quoted regulatory grant of authority to consider the issue, Judge Child correctly ruled that the following statements from the Mercers' appeal "encompass a claim that TNC is not qualified to hold the preferences in question:"

The Safford District of the BLM did unlawfully issue and unlawfully renew on an annual basis a livestock grazing permit to The Nature Conservancy for purposes other than livestock grazing. \* \* \* The BLM, contrary to federal statute and regulation, has issued grazing permits on the Muleshoe and South Rim Allotments to an allottee (The Nature Conservancy) whose explicit purpose on those lands is to not graze domestic livestock. This, we believe violates the letter and spirit of the Taylor Grazing Act as well as BLM grazing administration regulations. We reiterate a previous point: grazing permits can only be used for livestock grazing. The evidence is overwhelming that a) The Nature Conservancy has no intent to graze livestock on these allotments; and b) BLM is fully aware of that intent. In this situation, the BLM has no alternative but to cancel the existing permits and reassign them to the appellants. \* \* \* The Safford District of the BLM has unlawfully allowed The Nature Conservancy to advocate and claim rights and interests in public lands not allowable under current public law and regulation.

(ALJ Decision at 7, quoting Appeal at 1-3, 9.)

In addition, the Mercers claim in their appeal that "[t]he Safford District of the BLM has uncritically, and without challenge, accepted The Nature Conservancy's applications for nonuse." (Appeal at 9.) Elsewhere, they request "cancellation of a permit in violation of current statutes and regulations, and reassignment of that permit to a qualified applicant." (Appeal at 11; emphasis added.)

The Area Manager herself testified at the hearing, as paraphrased in Counsel for BLM's post-hearing brief, "that TNC was deemed to be qualified pending the completion of land use planning by reason of 43 CFR 4110.1-1, a regulation under which BLM was required to honor the existing permittee of record on acquired lands. HR, p. 111, 1. 1-19." (Post-Hearing Brief at 23.) She "further testified that the question of whether TNC was qualified to hold the grazing permits was also debated among BLM personnel. Vol. VI, p. 1058, 11. 16-24." (Mercer's Post-Hearing Reply Brief at 4.) Judge Child ruled that "BLM and TNC clearly contemplated and understood, prior to the presentation of evidence at the hearing, that TNC's qualifications to hold the preferences were at issue in this proceeding," and that "[t]here is simply no justification for application of the waiver provisions of 43 CFR 4.470(a), where, as here, the appeal encompasses the claim allegedly waived and the parties were prepared and permitted to present evidence upon this claim which was fully addressed by all parties at the hearing." (ALJ Decision at 8.)

That BLM was aware of the qualifications issue is reflected in the MOU between BLM and the Arizona State Land Department regarding BLM and state land exchanges. As Judge Child stated:

BLM contends TNC is qualified to hold the preferences for both the Muleshoe and South Rim Allotments, even if it is not engaged in the livestock business, because BLM was required to consider the permittees or lessees of the State lands acquired in 1986 as qualified to hold the BLM permits or leases pursuant to the Memorandum of Understanding (MOU) between BLM and the Arizona State Land Department regarding BLM/State land exchanges and 43 CFR 4110.1-1, which provides:

Where lands have been acquired by the Bureau of Land Management (BLM) through purchase, exchange, Act of Congress or Executive Order, and an agreement or the terms of the act or Executive Order provide that BLM shall honor existing grazing permits or leases, such permittees or lessees shall be considered qualified for grazing use on those acquired lands.

(Emphasis added). The MOU provides in pertinent part:

The exchanges should not interfere with ranching operations. . . . Unless the land is to be dedicated to a use that would preclude grazing, the range user will have the

preference to obtain grazing authorization from the new landowner.

(Exhibit R-4, p. 6, para. 5).

(ALJ Decision at 19-20.)

The fact is that TNC has no ranching operation with which an exchange could interfere. The majority's reference to Judge Child's ruling on TNC's qualifications to hold the grazing preferences as an "unauthorized initial adjudicatory decision," is contrary to the following analysis, offered by counsel for the Mercers, with which we agree: "This is patently incorrect. The BLM put this issue into the controversy by determining TNC was qualified to be a permittee and by approving its tenth year of nonuse. \* \* \* [T]he issue of TNC's qualifications to hold the grazing preferences is properly before the Hearings Division and under 43 CFR §4160, as a grazing decision." (Opposition to BLM's and TNC's Appeals by Mike and Virgil Mercer (Mercers' Opposition) at 5.) Judge Child correctly held that "the Mercers' application, being an application for permanent permits, raises not only the issue of how much grazing is appropriate, but also the issue of who should hold the grazing permit and, hence, the issue of who was holder of the priority for each allotment." (Decision at 9-10). For the additional reasons set forth below, we find that the Mercers should prevail on this issue.

Aside from TNC's 43 CFR 4.470(a) waiver argument, it would have been error for Judge Child to place the issue of TNC's qualifications to hold the grazing authorizations and associated preferences beyond the scope of the hearing over which he presided. We disagree with the majority's view that Judge Child's reasoning in the following statement is "incorrect:"

By electing intervener status in this proceeding, TNC placed itself and the question of its qualifications to hold grazing preferences on the Muleshoe and South Rim Allotments within the jurisdiction of the Administrative Law Judge presiding. Contrary to BLM's contentions, a determination of TNC's qualifications in this proceeding does not constitute an "initial adjudicatory decision" or an advisory opinion. One of the grounds for denying the Mercers' application is that nonuse was granted to the present preference holder, TNC. To grant nonuse to TNC, BLM necessarily must have determined that TNC was qualified to hold the preference and that evidence shows that such a determination was made. (Tr. 964, 1058).

(ALJ Decision at 8; emphasis added.) The logic of Judge Child's reasoning, as reflected in this quote, is unassailable.

In her decision, the Area Manager states: "In accordance with 43 CFR4110.3-2(c), 4130.1-1, I have authorized nonuse of the available Animal Unit Months to the current allottee, Nature Conservancy, for conservation and protection of the range." This statement demonstrates that in reaching her decision, the Area Manager, whether expressly or impliedly, evaluated TNC against the criteria embodied in the regulations to which she refers. The following statement from the majority defies what the Area Manager in fact decided: "It cannot be denied that BLM authorized nonuse to TNC. However, it did not do so in the decision that was appealed to Judge Child. That decision simply included the factual statement that the Area Manager had authorized nonuse to TNC." (Majority Opinion at 25.) The majority continues: "Thus, the June 12, 1990, BLM decision appealed by the Mercers cannot reasonably be considered an adjudication of TNC's preference or the actual determination to authorize nonuse." *Id.* To the contrary, nonuse was clearly awarded and authorized, and the discrepancy in the analysis provided by the Area Manager and the majority opinion is apparent and unavoidable. Judge Child was correct in his ruling that a prerequisite for nonuse authorization is that the grazer be qualified to hold the underlying permit or lease.

The Area Manager rejected the Mercers' application for the permanent grazing permit for want of a complete RMP, which was to address continued grazing on the Allotments. While the majority views our analysis as perpetuating Judge Child's error in addressing whether TNC was (or is) qualified to hold the permits and preferences on the Allotments, we must recognize that BLM's treatment of the respective applications of TNC (for a nonuse permit) and the Mercers (for a permanent permit) was arbitrary. During the lengthy period when BLM was preparing its RMP, TNC held a nonuse permit and Salazar held a grazing permit that were routinely being processed and renewed. If the Mercers' application was being denied until the RMP document was finalized, that reasoning would and should have been equally applicable to all applications for grazing authorizations in the Allotments, including those submitted by TNC and Salazar. However, those applications were being routinely processed. This inconsistency undermines BLM's stated basis in denying the Mercers' application, and renders its rejection on that basis arbitrary. TNC routinely applied for and received authorizations for nonuse of the Allotments for over a decade. There is merit to the Mercers' contention that BLM's approach amounts to a subversion of the spirit of the TGA, FLMPA, and PRIA.

The argument that the Mercers should have been denied the opportunity to challenge TNC's qualifications on the basis that BLM was considering, over a 10-year period, revisions to its land use plans, fails for a number of reasons. The fact that BLM may have been planning to complete development of its RMP, sometime in the future, may have arguably justified issuance of a series of 1-year permits instead of the 10-year permits then authorized under FLPMA. However, until the new plan was adopted, BLM was required to conform "resource management authorizations and

actions," such as the issuance of grazing permits and leases, to the plan that was currently in effect. See 43 CFR 1610.5-3(a). BLM should not have issued grazing authorizations to one applicant while treating other applicants as if such authorizations could not be issued. Under the TGA, both TNC and the Mercers had the right to a hearing in connection with their qualifications to hold the disputed permits and related preferences.

This Board has made clear that even had the Mercers not raised the issue of TNC's qualifications in its appeal from BLM's decision, when raised, the question should have been resolved at any stage in the process. Judge Child was authorized to hear evidence regarding grazing qualifications, even if it had not been raised in the appeal. Most recently, in Kay Kayser-Meyring v. BLM, supra, the Board reviewed an appeal filed by Kirk Shiner from a decision by ALJ Harvey C. Sweitzer, setting aside a decision of the Glenwood Springs Resource Area, BLM, awarding a grazing preference to Shiner, pursuant to section 15 of the TGA and implementing regulations, and remanding the case to BLM for issuance of the preference to Kayser-Meyring. In response to a BLM notice that 4,200 acres of newly acquired public land were suitable for grazing, five surrounding "neighbors" applied for the grazing preference. Kayser-Meyring originally applied for 200 of the available 600 animal unit months (AUMs). Upon evaluating the five applications, BLM issued a proposed decision dividing the 4,200 acres into two separate allotments, with 575 AUMs to Shiner, and 25 AUMs to a Mr. Kissinger. Kayser-Meyring filed a protest against the proposed decision, informing BLM that she was applying for the entire 600 AUMs. BLM issued a final decision rejecting Kayser-Meyring's protest, and awarding the grazing preference as proposed. Kayser-Meyring appealed to the Hearings Division.

BLM's decision in Kay Kayser-Meyring reflects its assumption that each of the five applicants had met the mandatory qualifications under 43 CFR 4110.1(a) (1994) for grazing, "based on their representations that each was engaged in the livestock business, owned or controlled contiguous base property, and was a United States citizen." 152 IBLA at 43. Judge Sweitzer concluded that Shiner was not a "qualified" applicant under 43 CFR 4130.1-2 (1994), and that BLM had improperly awarded the grazing preference to him since he did not "control" base property, as required by 43 CFR 4110.1(a). BLM complained that the issue of Shiner's qualifications was raised for the first time on appeal. The Board's response disposes of the argument that Judge Child erred in considering evidence as to whether TNC was qualified to hold a grazing preference:

In a competitive situation it was incumbent on BLM to insure that the qualifying conditions were met by each of the applicants before proceeding to a comparative analysis of the ranking factors. In its reply to Mrs. Kayser-Meyring's answer, BLM stated that the rangeland management specialist knew from Shiner and a coworker that Shiner

"had leased the contiguous Middleton property for years." (Reply at 3.) On this basis, Shiner was considered a qualified applicant without offering any supporting documentation to establish his control of leased property. While BLM complains that the issue of Appellant's qualifications was raised for the first time by Kay Kayser-Meyring on appeal, we believe that the issue of an applicant's qualifications could be challenged at any point in the process. Indeed, since only qualified applicants are entitled to compete for the grazing use, where a question arises regarding an applicant's qualifications BLM has a responsibility to reexamine its initial determination, and where appropriate eliminate an unqualified applicant from the process.

152 IBLA at 45 (emphasis added); see discussion of the Ashbacker doctrine, *infra*. The Board agreed that having properly determined that the award of the grazing preference to Shiner was improper, Judge Sweitzer correctly awarded the grazing preference to the next qualified applicant, Kay Kaiser-Meyring.

As far back as Ashbacker Radio Co. v. FCC, 326 U.S. 327, 333 (1945), the U.S. Supreme Court held that "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." Ashbacker has been characterized as a "towering" decision "[t]hat has served as a beacon in reviewing \* \* \* treatment of those who would compete for a \* \* \* license." New South Media Corp. v. FCC, 685 F.2d 708, 714 (D.C. Cir. 1982). The Court recognized that "Ashbacker involved original applications, but its comparative hearing instruction \* \* \* has long governed renewal proceedings in which rival applicants challenge incumbents." *Id.* In State of Alaska, 40 IBLA 79, 84 n.2 (1979), this Board recognized: "While there are differences in the circumstances and underlying rationale in the Ashbacker line of cases with many of the adjudications made in this Department where there are conflicting parties, the thrust of the doctrine should be followed where it is feasible so as to afford every interested party a full and timely opportunity to be heard." The instant case is not one where Ashbacker would be applied outside the context of licensing. In William J. Thoman, 157 IBLA 95, 103 (2002), this Board made a point of stating that grazing permits are "licenses," citing Frank Halls 62 I.D. 344 (1955).

The fact that BLM may have been planning to complete an RMP sometime in the distant future may have justified issuance of 1-year permits instead of the 10-year permits provided under FLPMA. But, under the Ashbacker doctrine, it does not justify BLM's practice of issuing grazing authorizations to one applicant while treating other applicants as if such authorizations were not being issued. Nor does BLM's assertion that TNC held the "preferences" support reversal of Judge Child's decision or denial of the Mercers' application. When TNC purchased the base properties from the prior owners, from 1982 through 1988, TNC did not automatically acquire the

preferences that were attached to those properties. TNC was required to apply for transfer of the preferences pursuant to 43 CFR 4110.2-3 (1981, 1988). Under 43 CFR 4110.2-1(a)(1)(1981, 1988), BLM had no authority to approve those transfers unless TNC met "all necessary qualifications." These qualifications include "being engaged in the livestock business," and ownership or control of "base property." See 43 CFR 4110.1 (1981, 1988).

The question remains as to whether TNC must utilize the Allotments at issue in connection with a grazing operation. The record leaves no doubt that TNC has not and does not intend to utilize the Allotments for grazing, but has manifested an on-going intent to continue utilizing the public lands at issue in furtherance of its recreation business, as described infra. The TGA does not contemplate the perpetual invocation of grazing in a distant state as a justification for granting "grazing" permits or leases for "conservation," "nonuse," or, in this case, recreation purposes. This case involves the issue as to whether a "livestock" operation in a distant state, suffices under the regulation, on an extended basis, or whether the grazing operation is, or must be conducted, in connection with the subject Allotments.

The Board construed 43 CFR 4110.2-1(a) (1981, 1988), in McLean v. BLM, 133 IBLA 225, 233 n.12 (1995), as follows: "This regulation effectively requires an on-going operation which utilizes the Federal range as a prerequisite to recognition of base property." Surely the "Federal range" reference does not apply, as in TNC's case, to conservation projects managed in distant states, with the record showing that TNC's stated purpose is to retire the involved Allotments from grazing. The only "base property" being used in the instant case in connection with a livestock operation is that being used by Salazar. With respect to any other base property, TNC was not eligible for a transfer of any preference, and BLM therefore had no authority to approve those transfers. The fact that BLM may have erroneously recognized TNC's grazing privileges does not preclude the Department from canceling such privileges when it is made aware of the applicant's ineligibility. See Charles Stewart, 26 IBLA 160 (1976).

For the reasons just stated, the initial approval and the annual renewal of the grazing permits for the two Allotments undoubtedly reflect BLM's implied conclusion that TNC was "qualified" to hold the grazing preferences. Judge Child correctly ruled that the arguments advanced in the Mercers' appeal "encompass a claim that TNC is not qualified to hold the preferences in question." Judge Child properly considered an issue which the majority would, with no meaningful citation of authority, place beyond his jurisdiction. The majority states: "Judge Child's refusal to heed BLM's warning that proceeding to review TNC's qualifications would amount to an unauthorized initial adjudicatory decision caused the parties the unnecessary time and expense of an extensive hearing and delay of more than a dozen years in resolution of this matter." (Majority Opinion at 27-28.) Not only was Judge Child's

ruling not an "initial adjudicatory decision," the record shows that TNC would prefer to continue issuing nonuse permits on a 1-year basis for another dozen years in order to perpetuate its conservation and recreation objectives, discussed *infra*. The majority would have us believe that "BLM's actions simply maintained the status quo." (*Id.* at 16.) We would submit that the issuance of nonuse leases or permits on an annual basis for a dozen years goes beyond maintaining the status quo. We find it unavoidable that Judge Child properly addressed the qualifications issue. The question now to be considered is whether Judge Child was correct in his ruling that TNC was not "qualified" to hold the subject grazing preferences. For the reasons stated below, we agree with Judge Child that TNC was not so qualified.

### TNC's Lack of Qualifications to Hold the Grazing Preferences

As noted, the Mercers argued before Judge Child that TNC is "unqualified to hold the preferences in question." (Decision at 12). "To be qualified to hold a preference," as Judge Child then observed, "an applicant for grazing privileges must, among other things, 'be engaged in the livestock business.'" *Id.* Judge Child reviewed a series of IBLA decisions in concluding that TNC failed to meet this standard. His analysis of Ralph E. Holan, 18 IBLA 432 (1973), is set forth below:

In Ralph E. Holan, the Board looked to the regulations precursory to 43 CFR 4110.1 for assistance in interpreting the phrase "engaged in the livestock business." 18 IBLA 432 (1973) (affirming BLM's decision to reject Holan's section 15 grazing lease applications because he was an unqualified applicant.) In Holan, the Board discussed Myrtle Colvin, IGD 245 (1941), a section 3 grazing permit case. At the time Colvin was decided, the regulations "required that a grazing applicant 'own livestock.' 43 CFR 501.3 (1940). Holan, 18 IBLA at 433-434. Under Secretary Dempsey interpreted this regulation, stating: "[T]he test should not be whether or not an applicant owns livestock but whether or not he is a recognized operator whose failure to own livestock is only a temporary condition." *Id.* at 434 (quoting Colvin, IGD at 250). After Colvin, the Department changed its regulations and "substituted 'engaged in the livestock business' for 'owns livestock,' 43 CFR 501.3(a)." Holan, 18 IBLA at 434. The Board, in Holan, decided that "engaged in the livestock business" meant that the applicant must "either own[] livestock for business purposes or [be] a recognized livestock operator who temporarily or due to circumstances beyond his control does not own any livestock." *Id.*

(Decision at 12-13). See also Defenders of Wildlife, 19 IBLA 219 (1975) (a corporation is a qualified applicant if it is itself engaged in the livestock business).

Judge Child issued the decision in Forgey Ranch Co. v. BLM, 116 IBLA 32 (1990), wherein he affirmed BLM's decision denying the application of Forgey Ranch Company (FRC) for a grazing lease within the Antelope Hills Allotment in Wyoming. Therein FRC argued that Metropolitan Life Company (Metropolitan), an insurance company, was unqualified to hold a grazing lease because, inter alia, it was not engaged in the livestock business, and it had chosen not to graze the allotment. After two years of authorized nonuse, Metropolitan transferred the base property and preference to another party. This Board agreed with Judge Child that Metropolitan was engaged in the livestock business, having been actively engaged in such a business in the three states of Oregon, Montana, and Wyoming. The record showed that the livestock grazed on Metropolitan's lands in Wyoming came from the company's other ranches in Montana and Oregon, and supported the decisions of BLM and Judge Child that Metropolitan was "engaged in the livestock business for profit." Id. at 37.

In finding TNC's posture distinguishable from that of Metropolitan, Judge Child summarized the evidence, which is verifiable against the record, in a way that demonstrates that TNC is not in the "livestock business" for profit. Judge Child's summary demonstrates that TNC's demonstrated intent was not to graze the lands included in the Allotments, but to permanently retire those lands from grazing:

In certain respects, the facts of this case resemble the facts of the Forgey case. Like Metropolitan, TNC has a primary corporate purpose other than ranching, owns and grazes livestock in states other than the subject state, has cattle brands, and derives revenue from livestock operations. Unlike Metropolitan, TNC did not acquire the base property and attendant grazing privileges through foreclosure, but by purchase for purposes of conservation and protection of riparian and wildlife values. TNC's ownership or control of livestock in other states is for conservation, not business, purposes. Also, the grazing privileges in question have been in nonuse for much longer than 2 years. Finally, with no intent to make use of the privileges, TNC, unlike Metropolitan, has not sought to transfer the unused privileges to another, but rather, has held onto them in furtherance of its conservation and protection purposes.

The record in this case shows that TNC does not own or control livestock for business purposes, is not a recognized livestock operator who temporarily does not own or control livestock for business purposes, is not engaged in the livestock business for profit, has no functioning "base property" as contemplated at 43 CFR 4110.2-1(a)(1), and never had the intent to conduct a livestock operation on either the Muleshoe Allotment or South Rim Allotment.

TNC operates ranches in six states for conservation, monitoring, or research purposes. (Tr. 1290, 1295) TNC's properties in Oregon, California, and New Mexico are leased to and grazed by private cattle operators. (Tr. 1267-70) TNC leases these properties to achieve its conservation objectives and because some acquisition agreements require TNC to lease the property back to the seller. (Tr. 1285-86) TNC owns and grazes bison in North Dakota, South Dakota, and Nebraska. (Tr. 1288-1289) TNC's objective for grazing in the midwest is to mimic how bison lived in the area and to maintain a midwestern ecosystem. (Tr. 1287, 1289).

TNC receives approximately \$740,000 in annual revenue from these ranching operations, exclusive of the operation on the Carrizo Plains. (Tr. 1269) This revenue is derived from grazing leases, selling bison, and donations. (Tr. 1270, 1289, 1293-1295) TNC does not pay taxes on the money it earns from its grazing leases because this is passive income. (Tr. 1301) It does not pay taxes on the money it receives from selling its bison because bison grazing is part of its conservation mission. (Tr. 1301) TNC pays property taxes on the grazed portion of its private land within the South Rim Allotment. (Tr. 1302) It does not pay property taxes on its private land within the Muleshoe Allotment. (Tr. 1302).

TNC made clear its intent not to graze the Muleshoe and South Rim Allotments through its agreements with BLM, its correspondence with BLM, its interoffice memoranda, its motion to intervene in this case, and its portrayals to the public. The Joint Stipulation of Facts states that TNC requested nonuse of the Muleshoe Allotment in 1982. The 1987 ROD stated that no AMP for the Muleshoe Allotment was scheduled because the lessee (TNC) "would rather not graze livestock at all in order to give the wildlife habitat and riparian areas a chance to improve." (Exhibit A-3, p. 1) The 1987 ROD further stated that a non-grazing CMA between BLM and TNC was being prepared which would suspend grazing on Muleshoe for another 5 years. (Exhibit A-3, it 1) The 1987 ROD did not say that BLM had decided not to allow grazing on the Muleshoe Allotment based upon available data. Rather, it said the lessee would rather not graze the allotment. (Exhibit A-3) Finally, consistently applied for nonuse of the Muleshoe and South Rim Allotments. (See, e.g., Exhib

\* \* \* \* \*

In their correspondence with BLM, TNC representatives made it clear that they felt grazing was inappropriate on the allotments. In a May 31, 1989, letter from Dan K. Campbell, TNC's Arizona State Director, to BLM's Safford District Manager, Ray Brady, Mr. Campbell was concerned about the Area Manager's statement that TNC had not leased 34,000 acres on South Rim from BLM but, instead, had a grazing lease for the land. Mr. Campbell felt that TNC's relationship with the public lands was greater than "an interest in grazing" and that TNC's "relationship to BLM [was] not primarily defined by whether or not there [were] TNC cows on BLM land." (Exhibit A-22, p. 2) Likewise, in a November 9, 1989, letter from Mr. Campbell to Mr. Brady, Mr. Campbell stated that TNC understood BLM had acquired Muleshoe and South Rim for riparian values, "not cows." (Exhibit R-40, p. 3) The Area Manager understandably concluded that TNC did not want livestock on the two allotments. (Tr. 945).

TNC's inter-office memoranda manifest an intention not to graze on the South Rim Allotment and a reluctance to graze the Muleshoe Allotment. TNC's Director of Stewardship, Mark Heitlinger, recommended to Mr. Campbell in a confidential memorandum that TNC postpone asking BLM to retire the South Rim Allotment from grazing because the grazing issue was "too hot." Mr. Heitlinger suggested that TNC continue to ask for a grazing deferment and seek to retire the South Rim Allotment in 1995 when the Salazar-DOW sales agreement terminates. (Exhibit A-18) Concerning the Muleshoe Allotment, in anticipation that the upcoming RMP would allow grazing on the Soza Mesa Area, Mr. Heitlinger suggested that TNC prepare an AMP for the portion of the Muleshoe Allotment known as the Soza Mesa, which AMP would include TNC's concept of appropriate grazing management. (Exhibit A-18) According to Mr. Heitlinger, a successful Soza Mesa AMP could help TNC acquire other grazing allotments and it would draw attention away from the South Rim Allotment where TNC would continue to work for retirement of the land from grazing. (Exhibit A-18) Although Mr. Heitlinger believed the Soza Mesa AMP could be "a high-profile model of successful land management and TNC-BLM cooperation," he also felt that TNC should only consider allowing livestock grazing on the Mesa if its conditions were satisfied. (Exhibit A-18).

In another confidential memorandum from Mr. Heitlinger to Mr. Campbell, Mr. Heitlinger discussed the Area Manager's proposal to permit grazing on the South Rim Allotment in addition to Mr. Salazar's use. (Exhibit A-19) Mr. Heitlinger's response to this proposal was that

TNC was "willing to hear a presentation" concerning the proposed grazing, but it "view[ed] the proposal as unacceptable." (Exhibit A-19, p. 2). The Area Manager responded that it was "clear TNC ha[d] no position but to be against grazing at [South Rim]." (Exhibit A-19, p. 2). At that point, Mr. Heitlinger wrote: "[I]t seems likely to me that we are squaring off for a battle at" the South Rim Allotment and that TNC should consider some "heavy handed and high stakes plays[,] including "calling in chips at the state office or other threatening actions." (Exhibit A-19, p. 3, emphasis in original) Although Mr. Heitlinger said this memorandum represents options that he felt TNC might consider, he only regretted writing it when he learned it would be used at the hearing. (Tr. 1320-21).

In TNC's motion to intervene, TNC concedes that it has an "interest in promoting and protecting conservation and protection." (Motion to Intervene by The Nature Conservancy, December 5, 1990, p. 2). TNC further stated it had an immediate interest to conserve and protect "the particular range that is at issue and for which the Nature Conservancy has the grazing allotment." (Id.) At the hearing, TNC representatives confirmed that the Muleshoe and South Rim Allotments were acquired and held by TNC to promote and protect rare species and riparian values. (Tr. 1258-1259, 1355-1358).

Finally, TNC manifested its intent not to run a livestock operation on either the public or private lands of the Muleshoe and South Rim Allotments when it represented to the public that it had successfully preserved both of these allotments. In a December 16, 1988, TNC letter to its members, TNC claimed it had "saved" 54,752 acres within the Muleshoe Allotment and 42,000 acres within the South Rim Allotment. (Exhibit R-39, p. 4) TNC owns only approximately 6,160 acres at Muleshoe and about 6,268 acres on South Rim. (Stip. 15; Exhibit A- 19). Not surprisingly, TNC is not perceived as part of the range community. (Tr. 1101).

The evidence is simply overwhelming that TNC does not own or control livestock for business purposes, does not need or even want the subject preferences for grazing purposes, and is not a recognized livestock operator who temporarily does not own or control livestock. Despite TNC's protection and conservation purposes for acquiring its lands, and locking up public lands including the Muleshoe and South Rim

Allotments, and its insistence that these two allotments not be grazed, TNC and BLM argue that TNC is qualified to hold the grazing permits on these allotments \* \* \*.

(ALJ Decision at 15-18; emphasis added.)

Additionally, Judge Child concluded that TNC was unqualified for the grazing preferences because it did not own or control "base property," within the parameters of 43 CFR 4110.1. He held that "the grazing preferences are less than satisfactory for the additional reason that the land it claims as its base property is not used in conjunction with a livestock operation which utilizes public lands. See 43 CFR 4110.2-1(a)." (ALJ Decision at 21). Moreover, he observed that "TNC has never conducted a livestock operation on its 'base property' or the public lands in question and never intended to do so." *Id.* <sup>2/</sup>

<sup>2/</sup> In this connection, we must note 43 CFR 4110.2-1(a), in effect in 1990, which provided:

"The authorized officer shall find land or water owned or controlled by an applicant to be base property (see § 4110.0-5) if:

(1) It serves as a base for a livestock operation which utilizes public lands within a grazing district; \* \* \*."

As noted, in *McLean v. BLM*, *supra* at 233 n.12 (1995), the Board quoted this regulation and stated: "This regulation effectively requires an on-going operation which utilizes the Federal range as a prerequisite to recognition of base property." TNC has failed to meet the terms of this regulation as interpreted by this Board.

In 1995, the above-quoted regulation was amended to read as follows: "The authorized officer shall find land or water owned or controlled by an applicant to be base property (see § 4100.0-5) if:

(1) It is capable of serving as a base of operation for livestock use of public lands within a grazing district; \* \* \*." (Emphasis added).

In amending this rule, the Department expressly stated that the change was intended to make organizations like TNC eligible to hold grazing preferences:

"The Department has introduced the concept of 'capability' of base property to support livestock in order to \* \* \* b) provide for situations where persons or organizations other than livestock operators such as insurers, financial organizations, or conservation organizations, acquire a ranch but may not at the moment be in the livestock business at the location." 60 FR 9927 (Feb. 22, 1995) (emphasis added.) *See Forgey Ranch Co. v. BLM*, *supra* at 37.

In our view, the TGA and the amended implementing regulation certainly contemplate that sooner or later such an acquiring organization will conduct a livestock business "at the location," rather than engage in an active scheme to retire the lands from grazing.

The majority makes much of the fact that the Area Manager was preparing an RMP for the Allotments, a process over 10 years in the making, and had legitimate reasons, or a "rational basis," for approving TNC's applications on a nonuse basis during that period. Our conclusion is that it was not until 1995 that BLM's regulations arguably made it lawful to issue a lengthy succession of 1-year nonuse permits to TNC, as it did under the circumstances of this case. Even so, the Supreme Court rejected the notion that the new regulations provide a basis for mothballing grazing allotments. See Public Lands Council v. Babbitt, 120 S.Ct. at 1926-27 (2000). Furthermore, given the fact that the Department did not even appeal the Tenth Circuit's ruling that the conservation permit regulation, which provided for 10-year conservation permits, was illegal (see Public Lands Council v. Babbitt, 167 F.3d at 1307 (1999)), nothing in the regulations now or previously in effect may be construed as enabling BLM to accomplish that result by issuing nonuse permits year after year after year as a way of accommodating the purpose of an organization whose intent is to retire the subject Allotments from grazing, thus subverting the spirit and purpose of the TGA. The concept of "multiple use" under the TGA and FLPMA includes more than the hiking and camping uses to which TNC would restrict the Allotments at issue in this appeal.

To repeat, "[n]o livestock grazing has occurred on the Muleshoe Ranch since the property was acquired by The Nature Conservancy in 1982." (Final Muleshoe Ecosystem Management Plan and Environmental Assessment, dated May 1998 (Muleshoe EMP and EA, at 23.)) As of 1998, the permitted use on the Muleshoe Allotment was 267 cattle from March 1 to February 28 at 100% land use, equating to 3,204 AUMs. However, the permitted use has been in "suspended status" since 1982. Id. TNC would prefer to perpetuate the Muleshoe Allotment in its current status, which is described in BLM's Muleshoe EMP and EA as follows:

### **Current Recreation Use**

The Muleshoe Ecosystem is used by a variety of outdoor enthusiasts who enjoy the area for hunting, hiking, horseback riding, birding and other wildlife observation, primitive camping and other related uses. An estimated 1,700-1,800 visitors a year visit the Muleshoe Ranch area for recreation purposes. These are estimates of use derived from visitor sign-in stations at The Nature Conservancy's Muleshoe Ranch headquarters and the entrance to Jackson Cabin Road. The number is probably conservative considering there are other access points into the area and that many visitors probably do not sign the registers on every visit.

The only developed sites in the Muleshoe Plan area are those associated with The Nature Conservancy's headquarters and at Pride Ranch. The

Muleshoe Ranch headquarters' facilities include a campground, casitas, nature trail and hiking trail. The campground is available for organized groups only. Fees are charged for the campground and casitas and advance reservations are required for both.

\* \* \* \* \*

TNC headquarters area is developed, providing an urban interface as well as being a gateway to most of the Muleshoe CMA. Buildings include staff residences, casitas for visitor center and dormitory, and workshop with storage. A group campground with portable toilets, a nature trail, and corrals are also on site. A visitor information point is located at the beginning of the Jackson Cabin Road.

(Muleshoe EMP and EA at 34-35.)

TNC's arrangement with BLM, as just characterized in BLM's Muleshoe EMP and EA, is transparent at best. It is at least debatable as to whether TNC's operations, with the described headquarters site, visitor center and dormitory, campground, toilets, nature trails, corrals, and horseback riding, are superior in terms of range management to livestock grazing authorized and legitimate under the TGA. BLM's Muleshoe EMP and EA fails to discuss the negative impacts of TNC's development of the Allotment for obvious conservation and recreation purposes. TNC's operations on the Muleshoe Allotment, with its hiking, horseback riding, and camping business, places the term "nonuse" into a context doubtfully contemplated under the TGA and implementing regulations. TNC's objectives are no doubt laudatory by the standards of those eager for an outdoor camping and ranching experience, provided through the environment which TNC has constructed, by its facilities, trails, horseback riding, dormitories, and visitor centers, described above. Further, those objectives appear consistent with TNC's conservation and monetary goals. However, restricting the lands to TNC's preferred uses does not square with the "multiple use" concept as invoked even by TNC. As we demonstrate below, the Area Manager's decision, which the majority would affirm, is incompatible with the TGA as interpreted by the Tenth Circuit and the U.S. Supreme Court.

While TNC might own or control bison in other states for conservation purposes, Judge Child shows in his decision that TNC has historically and consistently been adamantly opposed to grazing the lands subject to the Allotments. In the context of Judge Child's review, it is difficult not to view TNC's ownership of buffalo in three other states as predicated upon its purpose to protect the subject lands from grazing. The evidence adduced at the hearing is overwhelming that TNC has never

planned to graze the Muleshoe or South Rim Allotments, and in fact that its stated purpose has been and continues to be the protection and ultimate retirement of those Allotments from grazing, not to mention its obvious desire not to have a ranching operation interfere with its conservation and recreation interests, as reflected in the record. TNC's absolute and unwavering purpose is to retire the Allotments to non-grazing, or perpetual "nonuse," in other words, to allow TNC to continue its conservation and recreation activities. In fact, the record shows that the only reason TNC holds the two permits is so that the lands will not be grazed, but diverted to a use that suits TNC's purposes.

The majority maintains that the litigation which culminated in the U.S. Supreme Court decision, Public Lands Council, supra, is "irrelevant" to this case. Such a position is tenable only if Judge Child erred in addressing the issue of whether TNC was "engaged in the livestock business," and thus qualified to hold the grazing preferences for the Muleshoe and South Rim Allotments. As indicated, whether TNC was "engaged in the livestock business" was an issue which Judge Child properly and necessarily addressed. This subject was critical to the Public Lands Council litigation, which resulted from a series of 1995 amendments to the Department's grazing regulations, including a change to 43 CFR 4110.1(a)(1995) which eliminated the phrase "engaged in the livestock business," "thereby seeming to make eligible otherwise qualified applicants even if they do not engage in the livestock business." Public Lands Council, 120 S.Ct. at 1825; see discussion of 43 CFR 4100.0-5 (1995), supra.

The U.S. Supreme Court's review of the issue of whether the revised regulation comports with the TGA, 43 U.S.C. § 315b (1994), is most relevant to our present analysis. Section 315b of the TGA limits issuance of permits to "settlers, residents, and other stock owners \* \* \*." In 1936, the Secretary promulgated a regulation that limited eligibility to those who "ow[n] livestock." 2 App. 808 (Rules for Administration of Grazing Districts (Mar. 2, 1936)), cited at 120 S.Ct. at 1825. But in 1942, the Secretary amended the regulation to limit eligibility to those "engaged in the livestock business," and the regulation contained this language until 1994, when it was deleted. 1942 Range Code § 3(a), cited at 120 S.Ct. at 2825; see 43 CFR 4110.1(a)(1995). See Ralph E. Holan, supra.

The U.S. Supreme Court in Public Lands Council observed that "[t]he new change is not as radical as the text of the new regulation suggests." 120 S.Ct. at 1825. Although the new rule "seems to require only that an applicant 'own or control land or water base property,'" the Court observed that "[u]ltimately it is both the Taylor Act and the regulations promulgated thereunder that constrain the Secretary's discretion in issuing permits." Id. The statute, as the Court emphasizes, "continues to limit the Secretary's authorization to issue permits to 'bona fide settlers, residents, and other

stock owners.'" *Id.* The Court's analysis addresses the very concerns reflected in the Mercers' filings before Judge Child and this Board:

The ranchers' underlying concern is that the qualifications amendment is part of a scheme to end livestock grazing on the public lands. They say that "individuals or organizations owning small quantities of stock [will] acquire grazing permits, even though they intend not to graze at all or to graze only a nominal number of livestock all the while excluding others from using the public range for grazing." Brief for Petitioners 47-48. The new regulations, they charge, will allow individuals to "acquire a few livestock,...obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit." *Id.*, at 48, 112 S.Ct. 1011.

But the regulations do not allow this. The regulations specify that regular grazing permits will be issued for livestock grazing, or suspended use. See 43 CFR §§ 4130.2(a), 4130.2(g) (1998). New regulations allowing issuance of permits for conservation use were held unlawful by the Court of Appeals, see 167 F.3d, at 1307-1308, and the Secretary did not seek review of that decision.

Neither livestock grazing use nor suspended use encompasses the situation that the ranchers describe. With regard to the former, the regulations state that permitted livestock grazing, "shall be based upon the amount of forage available for livestock grazing as established in the land use plan...." 43 CFR § 4110.2-2(a) (1998) (emphasis added). Permitted livestock use is not simply a symbolic upper limit. Under the regulations, a permit holder is expected to make substantial use of the permitted use set forth in the grazing permit. For example, the regulations prohibit a permit holder from "[f]ailing to make substantial use as authorized for 2 consecutive fee years." § 4140(a)(2). If a permit holder does fail to make substantial use as authorized in his permit for two consecutive years, the Secretary is authorized to cancel from the grazing permit that portion of permitted use that the permit holder has failed to use. See § 4170.1-2. On the basis of these regulations, the Secretary has represented to the Court that "[a] longstanding rule requires that a grazing permit be used for grazing." Brief for Respondents 43, n.25. Suspended use, in turn, is generally imposed by the Secretary in response to changing range conditions. See *supra*, at 1820-1821. Permittees may also apply to place forage in "[t]emporary nonuse" for financial reasons, but the Secretary must approve such nonuse on an annual basis and may not grant it for more than three consecutive years. 43 CFR § 4130.2(g)(2) (1998). A successful

temporary nonuse application, moreover, does not necessarily take the land out of grazing use--the Secretary may allocate to others the forage temporarily made available via non-renewable permit. See §§4130.2(h), 4130.6-2. In short, nothing in the change to § 4110.1(a) undermines the Taylor Act's requirement that the Secretary grant permits "to graze livestock." 43 U.S.C. § 315b.

120 S.Ct. at 1826-27.

The above quotation provides an analysis of the 1995 revised qualifications regulation, which the Tenth Circuit had upheld, and which was before the Supreme Court. The Supreme Court upheld the qualifications regulation primarily on the basis that the TGA forbids the issuance of permits for conservation use, which is what the Secretary had attempted with the promulgation of the 1995 regulation authorizing 10-year conservation use permits. The Supreme Court's ruling makes clear that BLM's consistent 10-year renewal of TNC's nonuse permit for the Allotments was inconsistent with the TGA, as well as the new regulation governing whether TNC or any other grazer is qualified to hold a permit and related preferences.

The record is replete with evidence that TNC has sought, and that BLM has granted, nonuse status of the subject Allotments with the specific intent not to graze them--to maintain them in conservation use on a permanent basis. That the Secretary is without authority to issue a permit or lease under the TGA for conservation use was established by the Tenth Circuit in Public Lands Council v. Babbitt, *supra*, which, as indicated above, was acknowledged by the Supreme Court. The 1995 regulations at issue included "conservation use" as a permissible use of a grazing permit. See 43 CFR 4100.0-5 (1995) (defining "grazing permit" as a document that specifies "all authorized use [of public lands within a grazing district] including livestock grazing, suspended use, and conservation use.") "Conservation use" was defined as "an activity, excluding livestock grazing, on all or a portion of an allotment" for conservation purposes." 43 CFR 4100.0-5 (1995) (emphasis added.) The new regulation authorized the Department to approve "conservation use" for a period of up to 10 years, *i.e.*, for the entire duration of the permit.

In Public Lands Council v. Babbitt, 187 F.3d at 1307, the Secretary argued, *inter alia*, that section 2 of the TGA, 43 U.S.C. § 315a (1994), requires the Secretary to "do any and all things necessary to accomplish the purposes of this [Act]," and that one of the purposes of the TGA is "to preserve the land and its resources from destruction or unnecessary injury." Moreover, argued the Secretary, issuance of permits for conservation use is consistent with the mandate in FLPMA that the Secretary "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (1994). The Tenth Circuit rejected the Secretary's arguments, ruling that "the Secretary lacks the statutory authority to issue grazing

permits intended exclusively for conservation use," and that "[b]ecause there is no set of circumstances under which the Secretary could issue such a permit, the new conservation use regulation is invalid on its face." Public Lands Council v. Babbitt, 167 F.3d at 1308. As noted, the Secretary did not appeal the Tenth Circuit's ruling on the conservation use regulation.

It has come to the Board's attention that by memorandum dated October 4, 2002, Solicitor William G. Myers III addressed the very issues debated in the Public Lands Council litigation and this case. The purpose of Solicitor Myers' memorandum was to review a memorandum issued by his predecessor, former Solicitor John Leshy, dated January 19, 2001, "regarding BLM's authority to terminate or 'retire' grazing on particular public lands at the request of a rancher who holds a permit or lease \* \* \* to graze livestock on those lands." (Myers Memorandum at 1.)

Former Solicitor Leshy framed the context of his January 19, 2001, Memorandum to the Director of BLM as follows: "Holders of BLM grazing permits and leases \* \* \* have asked the BLM about its authority to accept their relinquishment of their permits, either in whole or in part, in order to retire the public lands they were using from further livestock grazing." (Leshy Memorandum at 1.) He proceeds to state that "[a]lthough BLM has from time to time made decisions to retire grazing permits, BLM's legal authority to do so has never been fully explicated in the situation where a permittee seeks to voluntarily retire the grazing permit as well as the associated permitted use." Id. He concludes that the TGA, FLPMA, and PRIA "provide ample authority for BLM to retire livestock grazing permits in appropriate circumstances." Id. He cites his own "Proposed New Mexico Standards and Guidelines for Grazing Administration: Evaluation and Recommendations (January 11, 2001), p. 6," as his only authority for the following proposition: "As this shows, the applicable statutes not only highlight the importance of protecting the ecological health of the public lands, but also direct that public lands that are being used for livestock grazing be managed not only for grazing use, but for other uses and resource values as well." (Leshy Memorandum at 3.) He then reduces the Tenth Circuit's opinion in Public Lands Council v. Babbitt, supra, to an observation made in a footnote: "[T]he TGA's goal of stabilizing the livestock industry is 'secondary' to the goals of safeguarding the rangeland and providing for its orderly use." (Solicitor Leshy Memorandum at 3.) Former Solicitor Leshy further stated that:

[T]he applicable standards are "multiple use" and "sustained yield" standards of FLPMA described above. The decision does not have to be based on a finding of "unnecessary or undue degradation," but rather may be made upon a determination that the public lands should be devoted to other uses. Such decisions generally remain within the sound discretion of the Secretary on the basis of the information

revealed in the administrative record (including appropriate NEPA analysis), and the requirements of other laws, such as the Endangered Species Act.

(Leshy Memorandum at 4.)

Solicitor Myers' memorandum modifies the analysis provided by former Solicitor Leshy, in addressing "the specific situation in which a grazing permittee volunteers to relinquish all or part of a permit to graze livestock upon the condition that BLM will permanently retire grazing on the public lands subject to the permit." *Id.* Solicitor Myers' analysis is consistent with the opinions issued by the Tenth Circuit and the Supreme Court. In our view, the following quotation from his memorandum accurately describes the arrangement between TNC and BLM:

This situation arises in the context of resource or land use conflicts and may involve an arrangement between a third party, such as a conservation organization, and a permittee. In such a situation, a third party generally offers to purchase the base property on the condition that the associated grazing permit is permanently retired. This arrangement meets the goals of the two private parties only where BLM, after a public land use planning process, makes an independent decision regarding the use of the public lands and decides to accept relinquishment of the grazing permit and terminate or "retire" the authorized grazing. However, this "retirement" cannot be considered permanent in nature absent congressional action.

*Id.* (Emphasis added; footnotes omitted.) As noted, TNC's purpose was to permanently retire the Muleshoe and South Rim Allotments from grazing. TNC managed to avoid using the property for grazing for over a decade by means of BLM's issuing a succession of 1-year permits.

Solicitor Myers stated that when lands subject to a grazing permit or lease become subject to an arrangement to "retire" such lands from grazing, BLM must "analyze whether the lands are still 'chiefly valuable for grazing and raising other forage crops.' 43 U.S.C. § 315." (Myers Memorandum at 3.) Moreover, relevant to TNC's stated purpose in holding the grazing preferences for the Allotments, he stated that should BLM conclude that the "lands still remain chiefly valuable for these purposes, the lands must remain in the grazing district," and that "[a]s such they would remain subject to applications from other permittees for the forage on the allotment that is relinquished to BLM." *Id.* This analysis applies to the Mercers' applications for the grazing preferences related to the subject Allotments.

Solicitor Leshy found footnote 5 to be the only portion of the Tenth Circuit's opinion in Public Lands Council v. Babbitt, supra, of relevance to his memorandum dated January 19, 2001. In his October 4, 2002, memorandum, Solicitor Myers, by contrast, recognizes the correctness of the Tenth Circuit's review of the conservation use permit question, in which he noted that the Tenth Circuit had "struck down a BLM regulation authorizing a conservation use permit," and had "found a presumption of grazing use within grazing districts and struck down the regulation because it reversed this presumption." (Myers Memorandum at 3.) The Supreme Court reviewed the qualifications regulation against the conservation use regulation which the Tenth Circuit declared facially invalid, and which the Department had the acumen not to appeal to the Supreme Court. Solicitor Myers quoted the following from the Tenth Circuit's opinion:

The TGA authorizes the Secretary to authorize grazing districts comprised of public lands "which in his opinion are chiefly valuable for grazing and raising forage crops." 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate. The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise. \* \* \* The Secretary's new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary's conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary's authority under section three of the TGA because land that he has designated as "chiefly valuable for grazing livestock" will be completely excluded from grazing even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

Public Lands Council v. Babbitt, 167 F.3d at 1308, quoted in Solicitor Myers Memorandum at 3. Solicitor Myers observed that "[t]he foregoing language clearly applies in the grazing retirement context," and that "[i]f the Secretary cannot foreclose grazing within a grazing district for a ten year period, the Secretary certainly cannot indefinitely retire grazing within a district." Id.

The Tenth Circuit was emphatic in its conclusion that the conservation use regulation was "invalid on its face." 167 F.3d at 1308. The following language applies in a compelling way to the instant appeal:

[I]t is true that the TGA, FLPMA, and PRIA, give the Secretary very broad authority to manage the public lands, including the authority to ensure that range resources are preserved. Permissible ends such as conservation, however, do not justify unauthorized means. We hold that the Secretary lacks the statutory authority to issue grazing permits intended exclusively for conservation use. Because there is no set of circumstances under which the Secretary could issue such a permit, the new conservation use regulation is invalid on its face. See 5 U.S.C. § 706(2)(c); Salerno, 481 U.S. at 745, 107 S.Ct. 2095.

(167 F.3d at 1308; emphasis added.) BLM's seemingly perpetual issuance of 1-year nonuse authorizations to TNC, whose purpose was to retire the subject Allotments from grazing, and at the same time pursue its recreation business on the subject public lands, is equivalent to the utilization of the "unauthorized means" declared off-limits by the Tenth Circuit.

Given that BLM has finally determined, pursuant to its land use planning process, that grazing is now appropriate on the subject Allotments, Solicitor Myers' following statement is reflective of the facts of this case:

[L]and use planning is a dynamic process. In the future, BLM, through the land use planning process, may designate lands where livestock grazing has ceased as once again available for grazing, as circumstances warrant. A decision to foreclose livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. Only Congress may permanently exclude lands from grazing use.

(Myers Memorandum at 4; emphasis added.) We think Solicitor Myers correctly reads the controlling legislation and regulations, as interpreted by the Tenth Circuit and the U.S. Supreme Court, as invalidating the approach taken by BLM in the instant case. Assuming that BLM legitimately issued a series of 1-year nonuse permits for over a decade, the land use planning process is a "dynamic" one, as Solicitor Myers emphasizes. We must now consider which rancher, including TNC, the Mercers, or any other party who is "qualified," should receive the grazing preferences.

To re-emphasize, we will again quote Solicitor Myers' summary of the relevant law, and then conclude by placing the instant case into its proper context:

A permittee cannot force BLM to permanently retire a grazing allotment from grazing use. BLM has the authority to consider, through the land use planning process, a permittee's proposal to relinquish a grazing permit in order to end grazing on the permitted lands and to

assign them for another multiple use. If the lands are within an established grazing district, BLM must analyze whether the lands are no longer "chiefly valuable for grazing and raising forage crops" and express its rationale in a record of decision. BLM must also consider whether the elimination of livestock grazing as a principal or major use of the public lands triggers congressional reporting requirements. A decision to cease livestock grazing is not permanent. It is subject to reconsideration, modification and reversal in subsequent land use plan decisions. This memorandum supercedes contrary Solicitor's Office memoranda or opinions.

(Myers Memorandum at 4.)

In light of the fact that TNC's intent and purpose over the years has been to prevent grazing on the Allotments, and to retire those Allotments from grazing, the Supreme Court's analysis raises the paramount question of whether TNC is now prepared to graze the Allotments consistent with the completed management plan, or whether it intends to perpetuate its use of "conservation" permits, declared invalid by the U.S. Supreme Court. The following contention, offered by the Mercers, nullifies the view that the Public Lands Council litigation is "irrelevant" to the present case:

To adopt TNC's and the BLM's interpretation [of the TGA and FLPMA] would read the words "livestock business" out of the grazing program and the regulations. Such an interpretation would permit groups and companies with TNC's vast financial resources to buy ranches, put the allotments in non-use, and thereby control the use of hundreds of thousands of acres of federal land. This violates the spirit and policy of the Taylor Grazing Act.

(Mercers' Opposition at 8.) In fact, this contention is completely consistent with the observation of the Supreme Court, as well as the Tenth Circuit, which, in upholding the deletion of the "engaged in the livestock business" phrase from the debated regulation, stated emphatically that the grazing industry's fear was unfounded that conservation groups would now be free to place public lands into "nonuse" and retire those lands from grazing. In his October 4, 2002, memorandum, Solicitor Myers clearly and accurately reflected this reasoning.

In its "Reply to the Mercers' Opposition to BLM and TNC Appeals," BLM states that if the Mercers' "view, as affirmed in the [ALJ] decision, were to be accepted, multiple use as the foundation for management of public grazing lands would be replaced by a livestock grazing mandate." (BLM Reply at 8.) The fact is that the Tenth Circuit and the U.S. Supreme Court have interpreted the TGA, FLPMA, and the PRIA as imposing the very "livestock grazing mandate" about which BLM is

complaining. Again, the concept of multiple use with regard to approved grazing lands, in this case governing the subject Allotments, reflects a "dynamic process", and must include the continuing review of whether grazing is appropriate at some level, even though it might be incompatible with TNC's desired and stated purposes.

However well-meaning the Area Manager of BLM might have been in issuing 1-year leases to TNC over a 10-year period, there is no present justification for continuing such a practice. Until the new plan was adopted, BLM was required to conform "resource management authorizations and actions," such as the issuance of grazing permits, to the plan then currently in effect. See 43 CFR 1610.5-3(a). In compliance with its own regulations, BLM was/is required to adjudicate any conflicting 1-year permit applications according to the criteria set forth at 43 CFR 4130.1-2 (1990). A close reading of that regulation shows that it applies only "[w]hen more than one qualified applicant applies for livestock grazing use." (Emphasis added.) TNC was not a qualified applicant at the time the Mercers filed their application, because it had no operative base property within the meaning of 43 CFR 4110.1-1(a).

As observed, supra, Judge Child was correct in ruling that TNC was not "engaged in the livestock business," in the context of this case, and, assuming that it acquired legitimate "base property" as an initial matter, TNC lost its base property through repeated annual nonuse of that property. The result of this reasoning is that now that BLM has determined, pursuant to its completed RMP's, grazing is now appropriate on the Allotments, TNC is not to automatically receive the grazing preferences. Rather, given the U.S. Supreme Court's review of 43 CFR 4110.1(a), as amended in 1995, we agree with the majority that this case must be remanded to BLM for a review of which applicant is presently qualified, and prepared, to graze the Allotments in question at BLM's approved level.

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James F. Roberts  
Administrative Judge

We concur:

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C. Randall Grant, Jr.  
Administrative Judge

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R. W. Mullen  
Administrative Judge